Convergence Communications, Inc. *and* International Brotherhood of Electrical Workers, Local 21, AFL–CIO. Cases 13–CA–40308–1 and 13–CA–40481–1

June 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On March 24, 2003, Administrative Law Judge Joseph Gontram issued the attached decision. The General Counsel filed limited exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The Respondent, Convergence Communications, Inc., Burr Ridge, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith, within the meaning of the Act, with the International Brotherhood of Electrical Workers, Local 21, AFL–CIO (the Union) as the exclusive bargaining representative of employees in the following bargaining unit:

> Telephone technicians who engage in low voltage construction, installation, maintenance and removal of telecommunication facilities (voice, sound, data and video) including telephone and data inside wire, interconnect, terminal equipment, central offices, PBX, fiber optic cable and equipment, microwaves, V-SAT, bypass, CATV, WAN (wide area networks), LAN (local area networks), and ISDN (integrated system digital network).

(b) Failing to continue in effect all the terms and conditions of employment provided by the collective-bargaining agreement that had been effective until December 31, 2001, by unilaterally changing the work hours, 401(k) plan payments, or working conditions of bargaining unit employees without first notifying the Union and affording it an opportunity to bargain about the change.

(c) Constructively discharging employees because of their union activity and support.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain collectively in good faith with the Union, as the exclusive representative of the employees in the bargaining unit, with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Restore and put into effect forthwith all terms and conditions of employment provided by the collective-bargaining agreement that had been effective until December 31, 2001, including those provisions unilaterally changed by the Respondent, until the Respondent bargains with the Union in good faith to an agreement or to an impasse.

(c) Make all delinquent payments to the employees' 401(k) plan in the manner set forth in the remedy section of the judge's decision, continue such payments until the Respondent bargains with the Union in good faith to an agreement or to an impasse, and make whole the unit employees for any loss of benefits or expenses resulting from the failure to make such payments, with interest.

(d) Within 14 days from the date of this Order, offer Greg Miller full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Greg Miller whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful constructive discharge or resignation of Greg Miller, and within 3 days thereafter, notify him in writing that this has been done and that the constructive discharge/resignation will not be used against him in any way.

(g) Make the employees in the appropriate bargaining unit whole by paying to them sums representing the difference between what they were paid for 32 hours' work per week and what they would have been paid for 40 hours work per week, since February 13, 2002, with interest.

[1] Neither the Respondent nor the Charging Party has filed exceptions.

[2] The General Counsel has excepted only to the judge's failure to provide the standard remedies for the violations he found. We find merit in the General Counsel's exceptions and shall modify the judge's recommended Order and notice accordingly.

(h) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Burr Ridge, Illinois, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2002.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain in good faith with the International Brotherhood of Electrical Workers, Local 21, AFL–CIO (Union) as the exclusive bargaining representative of employees in the following bargaining unit:

> Telephone technicians who engage in low voltage construction, installation, maintenance and removal of telecommunication facilities (voice, sound, data and video) including telephone and data inside wire, interconnect, terminal equipment, central offices, PBX, fiber optic cable and equipment, microwaves, V-SAT, bypass, CATV, WAN (wide area networks), LAN (local area networks), and ISDN (integrated system digital network).

WE WILL NOT fail to continue in effect all the terms and conditions of employment provided by the collective-bargaining agreement that had been effective until December 31, 2001, by unilaterally changing the work hours, 401(k) plan payments, or any term or condition of employment for bargaining unit employees without first giving notice to the Union and affording it an opportunity to bargain about that change.

WE WILL NOT constructively discharge or otherwise discriminate against any of you for supporting the Union or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, recognize and bargain collectively in good faith with the Union as the exclusive representative of the employees in the bargaining unit with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL restore and put into effect forthwith all terms and conditions of employment provided by the collective-bargaining agreement that had been effective until December 31, 2001, including those provisions unilaterally changed by us, until we have bargained with the Union in good faith to an agreement or to an impasse.

WE WILL make all payments to the employees' 401(k) plan provided in the most recent collective-bargaining agreement with the Union from the date we stopped making those payments until we have bargained with the Union in good faith to an agreement or to an impasse,

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and WE WILL make the bargaining unit employees whole for any loss of benefits or expenses resulting from our failure to make such payments, with interest.

WE WILL, within 14 days from the date of the Board's Order, offer Greg Miller full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Greg Miller whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful constructive discharge or resignation of Greg Miller, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the constructive discharge/resignation will not be used against him in any way.

WE WILL make the bargaining unit employees whole by paying to them the difference between what they were paid for 32 hours' work per week and what they would have been paid for 40 hours work per week, since February 13, 2002, with interest.

CONVERGENCE COMMUNICATIONS, INC.

Jeanette Schrand, Esq., for the General Counsel.
Thomas Purpura, pro se, and *Michael E. Avakian, Esq.,* for the Respondent.
Michael Sacco, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOSEPH GONTRAM, Administrative Law Judge. This case was heard in Chicago, Illinois, on February 6, 2003. The charges in Cases 13–CA–40308–1 and 13–CA–40481–1 were filed by the International Brotherhood of Electrical Workers, Local 21, AFL–CIO (the Union) on July 2, 2002 (together with a first amended charge filed on October 8, 2002), and September 9, 2002, respectively. The complaint was issued by the Regional Director for Region 13 on October 31, 2002, and was amended on November 20, 2002, and at the hearing on February 6, 2002. The complaint alleges that Convergence Communications, Inc. (the Company or the Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

The principal issues are (1) whether the Respondent has refused to bargain collectively with the representatives of its employees in violation of Section 8(a)(5) of the Act and (2) whether the Respondent discriminated against its employee, Greg Miller, on the basis of his membership in or support for the Union, in violation of Section 8(a)(3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Convergence Communications, Inc. provides telephone sales, services, and equipment from its facility in Burr Ridge, Illinois. During the past calendar year, the Company had gross revenue in excess of $500,000, and it purchased and received at its Burr Ridge facility goods and materials in excess of $50,000, which came directly from points located outside the State of Illinois. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Refusal to Bargain Collectively with the Union

Respondent does not dispute the facts of this case, so much as it disputes how these facts are characterized. Since at least 1998, Respondent has recognized the Union as the exclusive collective-bargaining representative of the following employees of Respondent pursuant to Section 9(a) of the Act:

> Telephone technicians who engage in low voltage construction, installation, maintenance and removal of telecommunication facilities (voice, sound, data and video) including telephone and data inside wire, interconnect, terminal equipment, central offices, PBX, fiber optic cable and equipment, microwaves, V-SAT, bypass, CATV, WAN (wide area networks), LAN (local area networks), and ISDN (integrated system digital network).

The Company's recognition of the Union's representative status is embodied in successive collective-bargaining agreements, the most recent of which was due to expire on December 3, 2000. However, the parties extended that agreement to December 31, 2001. Article 1 of section 1.02(a) and (c) of the extended agreement states that a party wishing to change or terminate the agreement must notify the other party, in writing, at least 60 days prior to the expiration date, and that "[t]he existing provisions of the Agreement shall remain in full force and effect until a conclusion is reached in the matter of proposed changes."[1]

The parties' collective-bargaining agreement provides that a workweek shall constitute 40 hours, and requires the Respondent to make certain payments to a savings and security plan, commonly referred to as "401(k)" benefits.

As the most recent collective-bargaining agreement with the Union was approaching its termination, the Union made two written attempts to bargain. On October 30, 2001, and January 2, 2002, the Union sent letters to the Respondent seeking bargaining for a successor collective–bargaining agreement. The Respondent's president, Thomas Purpura, signed for the receipts of these letters and admits receiving them. In the letter

[1] GC Exh. 4, p. 3, § 1.02(c).

dated October 30, 2001, the Union proposed to amend the existing collective-bargaining agreement and enclosed a proposed 3-year agreement. In the letter dated January 2, 2002, the Union submitted a different proposal and enclosed a proposed 2-year agreement. In addition, the Union's business agent and negotiator, Michael Sacco, telephoned Purpura in January 2002, and left a message on Purpura's voice mail, including a request that Purpura telephone Sacco in order to arrange a meeting to discuss the contract.

The Respondent refused these requests to bargain and later confirmed this refusal in a letter dated February 1, 2002. In this letter, the Respondent stated that it had decided not to renew the collective-bargaining agreement. The Respondent admits taking this action as part of its decision to withdraw recognition of the Union as the exclusive bargaining agent of its unit employees. The Respondent does not claim nor is there any evidence that it had any reason to believe its employees no longer wished to be represented by the Union. After receiving the Respondent's February 1 letter, the Union, through Michael Sacco, called Thomas Purpura two more times, once in early February 2002 and again in March 2002. On both occasions, Sacco was told that Purpura was not available, and on both occasions he left a voice-mail message for Purpura. Purpura never returned either of these telephone calls.

On February 13, 2002, the Respondent changed the working conditions of its employees by (1) reducing the workweek of its employees from 40 to 32 hours per week, and (2) stopping Respondent's contributions to the employees' 401(k) plan. Greg Miller, a telephone technician and a member of the bargaining unit, learned of these changes in the February 13 letter from Respondent. Respondent took this action without prior notice to the Union and without affording the Union an opportunity to bargain with respect to any aspect of the charges. In the February 13 letter, the Respondent reaffirmed that it had "decided not to renew the Union contract." The Respondent did not give any advance notification to the Union of these changes. After these changes were implemented, Greg Miller resigned from the Company on March 18, 2002.[2]

The Respondent claims in the present proceeding that the Union did not attempt to negotiate a new collective-bargaining agreement. This claim has no merit and is belied by the facts admitted by the parties. The Respondent does not deny that the Union did send it two proposed contracts for discussion or signature, and that the Union's business agent telephoned Thomas Purpura several times in an effort to negotiate a contract. Nor does the Respondent deny that it failed to reply to any of these attempts to bargain or to negotiate a contract.

B. Discrimination in the Constructive Discharge of Greg Miller

After the foregoing changes in the working conditions of the Respondent's employees were implemented, and as a direct result of the changes, Greg Miller, a telephone technician and a member of the bargaining unit, resigned from the Company on March 19, 2002. Although the Respondent disputes that its unilateral actions in changing the terms and conditions of Miller's employment caused him to resign, it offered no evidence or argument pointing to any other cause for his resignation. Miller testified that the benefits provided to him as a union member, including the 401(k) benefits and full-time, 40-hours per week employment, were so important to him and his family that he could not work under the conditions imposed by the Respondent on February 13. Accordingly, he was forced to resign and to seek employment in a union position with another employer. I accept this credible, unimpeached and uncontradicted testimony.

C. The Company's Defense

The defense offered by the Respondent, through Thomas Purpura, is that he is not antiunion, that he was formerly a member of the Union, and that the reason he refused to negotiate with the Union and imposed the unilateral changes noted above was because of the lack of earnings by his Company. For example, the Respondent's income statement for the period January through June 2001 shows net ordinary income of only $12,523.25. The Respondent's financial statements also show that during the period 2000 and 2001, Thomas Purpura was paid less in wages than some employees, including union members.

D. Analysis

1. Section 8(a)(1) and (5)

(a) Section 8(a)(5) of the Act provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," subject to other provisions not applicable herein. Section 8(d) of the Act defines "bargain collectively" as the mutual obligation of the employer and the representative to "meet" at reasonable times and to "confer" in good faith concerning the terms and conditions of employment.

In the present case, the Respondent refused to meet or confer with the representative of its employees concerning the terms and conditions of employment. On four separate occasions during the 2 months prior to or immediately after the termination of the existing collective-bargaining agreement, union representatives contacted the Respondent in an effort to negotiate a new contract. The Respondent failed to respond to the written requests and failed to even take the telephone calls, much less return the telephone calls, from the union representative. The Respondent subsequently made clear why it was refusing to bargain when it informed the Union, as well as its employee, Greg Miller, that it had unilaterally decided "not to renew the Union contract."

When an employer and a union have established a 9(a) relationship, such as the relationship between the parties in this proceeding, the union enjoys a presumption of continuing majority support after the expiration of the contract. *Fleming Industries*, 282 NLRB 1030 (1987). Accordingly, the Respondent's unilateral refusal to recognize and bargain with the Union violated the Act.

The Respondent claims that it refused to bargain with the Union because it was experiencing declining collections and

[2] In a letter dated March 18, 2001, Miller advised the Company of his intent to resign in 2 weeks. (GC Exh. 9.) The Company informed Miller at the end of his workday on March 18 that his resignation would be effective immediately.

revenues. Nevertheless, the reason or reasons why the Respondent refused to bargain are not relevant to a violation of Section 8(a)(5). *NLRB v. Katz*, 369 U.S. 736, 745 (1962) ("there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact—'to meet and confer'—about any of the mandatory subjects"); *J & C Towing Co.*, 307 NLRB 198 (1992) (where the Board held that the employer violated Sec. 8(a)(5) by refusing to meet with the union and by refusing to return the union negotiator's telephone calls). Indeed, assuming the reliability of the Respondent's records, the financial difficulty it might have had in paying the wages proposed in the collective-bargaining agreement, as well as its ability to continue making payments to its employees' 401(k) plans as it had in the past, are matters that it could have, in the first instance, negotiated with the Union. The Respondent's lack of earnings might explain or even justify a position it might take at the bargaining table, but it does not explain or excuse the Respondent's failure to bargain. By refusing to even confer or meet with the Union, the Respondent deprived the Union and itself of the opportunity to discuss and attempt to accommodate these financial issues. The Respondent's refusal to meet and confer with the Union under the facts of this case, and without regard to the reason why it so refused, constitutes a violation of Section 8(a)(5) and (1) of the Act

(b) After the Respondent refused to meet and confer with the Union, it unilaterally changed the working conditions of its employees. These changes involved, inter alia, the employees' working hours and the employer's payments to the employees' 401(k) plan. The Respondent did not notify the Union of its intent to change these working conditions of its employees, much less give the Union an opportunity to bargain concerning such changes.

Generally, the terms of a collective-bargaining agreement remain in force until a new agreement has been reached or impasse occurs. E.g., *W. A. Krueger Co.*, 299 NLRB 914, 915 (1990). Moreover, the collective-bargaining agreement in the present case specifically provided for the continuation of its provisions in the absence of timely notice, which was not provided by the Respondent. Unilateral changes in hours and other terms and conditions of employment, even when made after the collective-bargaining agreement has expired, violate the employer's obligation to bargain collectively as mandated in Section 8(a)(5) of the Act. *NLRB v. Katz*, supra. The statute expressly covers work hours, while 401(k) plan contributions are matters within the meaning of "terms and conditions of employment." 29 U.S.C. § 158(d); *Trojan Yacht*, 319 NLRB 741 (1995); see *Superior Sprinkler, Inc.*, 227 NLRB 204 (1976). Accordingly, the obligation to bargain concerning such matters as 40l(k) plan payments and hours of work continues after expiration of the existing collective-bargaining agreement. *Frankline, Inc*., 287 NLRB 263 (1987). This is especially so when the expiration of the collective-bargaining agreement is due, at least in part, to the unfair labor practices of the Respondent. The Respondent may not profit from its own unfair labor practices. *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1969).

As noted above, the only defense offered by the Respondent is that it withdrew recognition of the Union, refused to bargain, and imposed the unilateral changes in order to save money, which was necessitated by declining collections and revenues.[3] However, it is well established that financial inability to pay is not a defense to a charge that the employer violated Section 8(a)(5) and (d) of the Act. *Navigator Communications Systems, LLC*, 331 NLRB 1056 (2000); *Trojan Mining Processing*, 309 NLRB 770 (1992); see *NLRB v. Katz*, supra. Accordingly, I conclude that the unilateral actions of the Respondent in eliminating payments to its employees' 401(k) plan and in reducing the hours of its employees to a 32-hour workweek were done in violation of Section 8(a)(1) and (5) of the Act.

2. Section 8(a)(1) and (3)

After the Respondent changed the working conditions of its employees, including the suspension of 401(k) payments and the reduction of working hours from 40 hours to 32 hours per week, Greg Miller, a member of the Union, tendered his resignation. Miller testified that he was forced to quit because he needed the 401(k) plan and a full 40-hour workweek for him and his family's welfare. The General Counsel asserts that he was constructively discharged in violation of Section 8(a)(3).

In *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976), the Board set forth the elements for establishing a constructive discharge as follows:

> There are two elements which must be proven to establish a "constructivedischarge." First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

The first criterion is satisfied by the Respondent's unilateral change regarding contributions to its employees' 401(k) plan. See *M.P.C. Plating, Inc. v. NLRB*, 912 F.2d 883 (6th Cir. 1990) (cut in benefits); *Borden, Inc*., 308 NLRB 113 (1992), enfd. 19 F.3d 502 (10th Cir. 1994) (cut in pay and benefits). Also, the Board has held that employees who quit as a result of a reduction in work hours have been constructively discharged. *Sullivan Transfer Co*., 247 NLRB 772 (1980). The second criterion is satisfied by the Respondent's admitted motive in committing the above-described 8(a)(5) unfair labor practices, viz, its unilateral and preemptive decision to stop dealing with or recognizing the Union as the representative of its telephone technician employees. Moreover, the Board has found that employers constructively discharge employees by unilaterally changing working conditions. *Auto Fast Freight*, 272 NLRB 561 (1984), enfd. 793 F.2d 1126 (9th Cir. 1986). Like the employees in *Auto Fast Freight*, the union employees of the Respondent, such as Greg Miller, were given the choice to "accept changed working conditions, including deceased [benefits and hours],

[3] It is not at all clear that the Respondent was financially unable to make the 401(k) contributions as it had done in the past. Nevertheless, for purposes of this Decision, and because such difficulty would not affect the result in this case, it is assumed that the Respondent would have had much difficulty in continuing to make the 401(k) payments after the termination of the most recent collective-bargaining agreement.

and give up union membership, or quit their jobs. Such an option is unlawful." 272 NLRB at 563.

This unlawful option, also known as a "Hobson's Choice" constructive discharge, is an independent reason supporting the determination that Greg Miller was constructively discharged from the Respondent. The unlawfulness of such a choice is heightened when the employer improperly withdraws recognition of the union. *Goodless Electric Co.*, 321 NLRB 64 (1996). An employee, such as Greg Miller, who is forced to choose between losing his job and giving up statutory rights, is constructively discharged when he chooses the former. *Superior Sprinkler, Inc.*, supra. In these circumstances, the employer's conduct is inherently destructive of important employee rights, so that independent proof of antiunion motivation is not required. *Electric Machinery Co. v. NLRB*, 653 F.2d 958, 965 (5th Cir. 1981) (citing *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967).

Accordingly, I conclude that the Respondent constructively discharged Greg Miller, a member of the bargaining unit, in violation of Section 8(a)(1) and (3).

3. Posthearing issues

Although the Respondent was represented by its president and owner, Thomas Purpura, throughout the hearing process, it elected to obtain legal counsel after the hearing. Despite clear directions and warnings given to Purpura at and prior to the hearing, he did not obtain legal counsel until February 26, 2003, the date that posthearing briefs were due. The Respondent's counsel did file a brief on February 27, 2003, 1 day after it was due, a Herculean effort in light of the fact that the "Brief" was 39 pages in length. The General Counsel and the Union have filed objections to the brief, and request that the untimely brief be stricken. Although I find their objections to be well taken, particularly in light of the Respondent's late attempt to obtain counsel on the very date that briefs were due, I have considered Respondent's brief, especially in light of the Respondent's pro se status throughout the hearing.

Nevertheless, and in spite of my consideration of the matters contained in the Respondent's brief, I have determined that my reasons and conclusions as previously set forth herein remain unchanged.

The Respondent maintains that the Union does not represent a majority of the bargaining unit members. However, for the reasons set forth above, this contention must be rejected. See, for example, *Fleming Industries*, supra. In this regard, I also note that the Respondent made no attempt throughout the hearing to attempt to establish or disprove the majority status of the Union.

The Respondent alleges in its brief, without citation to authority or to any particular facts in the present case upon which it relies, that the dispute in this case should have been submitted for resolution to the arbitration/grievance process set forth in the collective-bargaining agreement. However, this claim ignores the Respondent's actions in the case and its position throughout the hearing process—that it had repudiated the collective-bargaining agreement and was no longer bound by its terms. In circumstances such as these, the Board has held that deferral to the parties' agreed resolution procedure is not appropriate. *Avery Dennison*, 330 NLRB 389 (1999). In *Avery Dennison*, the Board stated:

> The statutory issues in this case, including the lawfulness of the Respondent's withdrawal of recognition and subsequent changes in working conditions, are particularly poor subjects for deferral because they involve the very existence of a collective-bargaining relationship between the parties, a matter within the exclusive jurisdiction of the Board.

330 NLRB at 391. The Board also noted that the rationale for deferral loses its force when the respondent has sought to terminate its relationship with the Union, as the Respondent has done in the present case. Id. Accordingly, the Respondent's assertion that the issues in this case should be resolved through the arbitration process and that the Board should defer to such process is rejected.

The Respondent also alleges that Section 10(b) of the Act, which imposes a 6-month limitation period on charges alleging unfair labor practices, bars the present proceeding. The charge in the present case was filed on July 2, 2002, and the Respondent alleges that the Union had notice of the Respondent's repudiation of the collective-bargaining agreement on January 1, 2002.

Section 10(b) is a statute of limitation and is not jurisdictional in nature. Accordingly, it is an affirmative defense which must be pleaded, and if not timely raised, is waived. *R. G. Burns Electric*, 326 NLRB 440 (1998). The burden of proving such an affirmative defense is on the party asserting it. *Chinese American Planning Council*, 307 NLRB 410 (1992). Moreover, the 10(b) period commences when a party has clear and unequivocal notice of the violation of the Act. *Mine Workers Local 17*, 315 NLRB 1052 (1994), or where a party in the exercise of reasonable diligence should have become aware that the Act has been violated. *Bryant & Stratton Business Institute*, 327 NLRB 1135, 1145 (1999). In the present case, the Respondent failed to allege the limitation period as a defense until the filing of its posthearing brief. Accordingly, I find that this defense has been waived.

In addition, the Respondent offers no evidence that the Union had notice of the repudiation of the collective-bargaining agreement on January 1, 2002. The first time that the Respondent gave the Union notice of its repudiation of the collective-bargaining agreement was its letter of February 1, 2002. See *also Waste Management of Utah*, 310 NLRB 883 (1993) (a refusal to bargain is not ripe when an employer has merely failed to respond to a union's demand for bargaining). Since the charge was filed within 6 months of the date the Union first received clear and unequivocal notice of the Respondent's repudiation of the agreement and refusal to bargain, the charge in the present case is timely.

The remainder of the Respondent's brief is devoted to a lengthy recitation concerning the supposed application of Section 8(f) of the Act. The short answer to this overly long argument is that the Respondent has failed to prove or attempt to prove that it is in the building or construction industry. There is simply no evidence in the record to support the Respondent's claim that it is in the building or construction industry. The Respondent has the burden of proof to establish that it falls

within 8(f)'s exception. *Brannan Sand & Gravel Co*., 289 NLRB 977, 979 fn. 10 (1988). Therefore, the Respondent's argument under Section 8(f) is rejected because of its failure to meet its burden of proof.

Accordingly, for the reasons set forth herein, I conclude that by virtue of the preemptive and unlawful action of the Respondent in refusing to recognize and to bargain with the Union, the unilateral changes imposed by the Respondent to the working conditions of its bargaining unit employees, and the Respondent's unlawful, constructive discharge of Greg Miller, a member of the bargaining unit, the Respondent violated Section 8(a)(1), (3), and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union is the exclusive bargaining representative of telephone technicians employed by the Respondent.
4. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally and without notice refusing to recognize the Union as the exclusive representative of the employees in the appropriate bargaining unit and refusing to bargain with the Union regarding a successor collective-bargaining agreement.
5. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally and without notice changing the working conditions of its bargaining-unit employees.
6. The Respondent violated Section 8(a)(1) and (3) of the Act by constructively discharging its employee, Greg Miller.
7. The foregoing violations constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the appropriate bargaining unit, I shall order it to recognize and bargain with the Union.

Having found that the Respondent unilaterally changed the terms and conditions of the collective-bargaining agreement between the Respondent and the Union which expired on December 31, 2001, I shall order that the collective-bargaining agreement be reinstated forthwith and continued in effect until after a new agreement or an impasse is reached.

Having found that the Respondent, unilaterally and without bargaining with the Union stopped making payments to its bargaining unit employees' 401(k) plan on or about February 13, 2002, I shall order that it must make payments to the bargaining unit employees' 401(k) plan as required by the collective-bargaining agreement and as it had done before its unilateral action, in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent, unilaterally and without bargaining with the Union, decreased the work hours of its bargaining unit employees from 40 hours to 32 hours per week, I shall order the Respondent to restore the status quo ante and make its bargaining unit employees whole for the loss suffered by such unlawful action and pay to such employees the loss in pay that they suffered when their workweek was reduced from 40 hours to 32 hours.

Having found that the Respondent discriminatorily discharged Greg Miller, I shall order that it offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, supra.

[Recommended Order omitted from publication.]